No. 95-420

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*

v.

FRED BERRE DOUGLAS, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent, Fred Berre Douglas, asks leave to file the accompanying Brief in Opposition To Petition for Writ of Habeas Corpus, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed before the California Supreme Court, the United States District Court, and this Court. See Motion for Leave to File In Forma Pauperis, filed by Petitioner Fred Berre Douglas in this Court on January 10, 1994, Case No. 93-7399.

Pursuant to Supreme Court Rule 39.1, no affidavit of poverty is required inasmuch as counsel were appointed pursuant to 18 U.S.C. section 3006A and Rule 26.8.4 of the Local Rules for the Central District of California.[1] 18 U.S.C. §3006A.

Dated: October 9, 1995.

Respectfully submitted,

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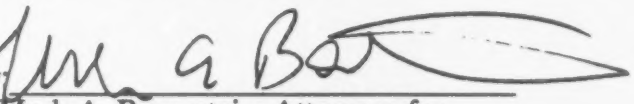
By 
Mark A. Borenstein, Attorneys for
Fred Berre Douglas, Petitioner

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[1] 18 U.S.C. section 3006A(a) provides in pertinent part that "[e]ach United States district court . . . shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section." Local Rule 26.8.4 provides in pertinent part:

> (a) Appointment of Counsel:
>
> (i) Each indigent petitioner shall be represented by counsel unless petitioner has clearly elected to represent himself . . . A panel of attorneys qualified for appointment in death penalty cases will be certified by a selection board appointed by the Chief Judge of the district.

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QUESTION PRESENTED

1. Where the district court consistently has controlled the pace of federal habeas corpus proceedings from their inception, and where the district court has taken several months to consider a habeas petitioner's request for an evidentiary hearing on numerous constitutional claims, has the district court complied with its duty under *In re Blodgett*, 502 U.S. 236, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992) to "take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case," such that a writ of mandate ordering the district court to decide the habeas petition within 120 days is unwarranted?

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ARTHUR CALDERON, Warden of San Quentin Prison, *Petitioner*

v.

FRED BERRE DOUGLAS, *Respondent.*

Respondent Fred Berre Douglas ("Respondent" or "Mr. Douglas") respectfully requests this Court to deny the petition for writ of certiorari ("Certiorari Petition"), seeking reversal of the Ninth Circuit's denial of a writ of mandate to the district court for the Central District of California and requesting the issuance of a writ of mandate to the district court.

STATEMENT OF THE CASE

Petitioner Warden Calderon seeks a writ of certiorari from this Court, requesting that this Court (1) grant certiorari and issue a writ of mandate to compel the district court to decide Mr. Douglas' federal habeas corpus petition,[1] and (2) adopt time limits for the district courts to render a decision on all pending habeas petitions in capital cases. Certiorari Petition at 20, 24. The Warden's Certiorari Petition is based on the erroneous view that the district

[1]Petitioner also requests that this Court "reverse and remand the Ninth Circuit's denial of mandamus." Certiorari Petition at 24.

court has failed to insure the prompt resolution of this case. From the inception of these proceedings however, the district court rigorously has controlled the pace and the timeliness of the parties' pleadings and briefs, frequently denying Mr. Douglas' requests for extensions of time and, in counsels' view, preventing a full and complete habeas investigation. The district court should not be ordered to accelerate further the pace of these proceedings and thereby further jeopardize the "full and fair consideration" of all the issues, required by *In re Blodgett*, 502 U.S. 236, 240, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992).

On October 4, 1994, Mr. Douglas filed a Request for Evidentiary Hearing on his amended petition for writ of habeas corpus. Petitioner filed his Opposition on October 31, 1994. Mr. Douglas filed his reply on November 14, 1994. The pleadings on the Request consume 140 pages on approximately fifty-six (56) claims. Despite the pendency of Mr. Douglas' Request for Evidentiary Hearing, on or about April 14, 1995, claiming an unreasonable delay, Warden Calderon filed in the district court for the Central District of California, a motion requesting an immediate ruling on Mr. Douglas' Petition for Writ of Habeas Corpus ("Motion To Decide Petition").

The district court denied petitioner's Motion To Decide Petition, rejecting the Warden's description of the procedural history of these proceedings, ruling that this "case has moved along at a steady rate since the beginning," and recognizing its "responsibility to give both parties 'full and fair consideration to all issues presented in the case.' *In re Blodgett*, 502 U.S. 236, 240 (1992)." *See* May 10, 1995 Order, Certiorari Petition, Appendix A at 6. The district court further found the Warden's "claim of a 4-year delay in this case is misleading and

his characterization of the delay as 'unreasonable' is unsupported by the facts." May 10,1995 Order, Certiorari Petition, Appendix A at 6.

The Warden filed a Petition for Writ of Mandate ("Mandate Petition") in the Ninth Circuit on or about June 19, 1995; the Ninth Circuit ordered Mr. Douglas to file a response; Mr. Douglas timely opposed the Mandate Petition. The Ninth Circuit denied the Mandate Petition on August 3, 1995. Certiorari Petition, Appendix B. Based on the procedural history of this case, discussed below, the district court's ruling, and its responsibility to give "full and fair consideration to all issues presented in the case," *In re Blodgett*, 502 U.S. 236, 240 (1992), this Court should deny the Certiorari Petition and decline to issue a writ of mandate to the district court.

Counsel for Mr. Douglas were appointed by the district court for the Central District of California in November 1991. Though the district court granted two extensions of time to enable Mr. Douglas to investigate and prepare a federal habeas petition, on September 15, 1992, the trial court denied Mr. Douglas' third request, stating that "one year is sufficient time to prepare and file a petition for writ of habeas corpus in this case," and that "[n]o further extensions of time will be granted [to file the petition] absent compelling circumstances." *See* September 15, 1992 Order, attached as Appendix A hereto. On September 18, 1992, the district court denied in its entirety Mr. Douglas' request for funds to retain an investigator and mental health experts in order to develop his habeas claims. On November 16, 1992, Mr. Douglas filed his one and only Petition for Writ of Habeas Corpus ("Habeas Petition"). On February 12, 1993, in ruling on the Warden's motion to dismiss the Habeas Petition, the district court, in a detailed 8-page order, found that the Habeas Petition contained claims that it deemed

unexhausted. *See* February 12, 1993 Order, attached as Appendix B hereto. The trial court ruled that it would hold the Habeas Petition in abeyance and maintain the stay of execution for a period of 60 days while Mr. Douglas returned to state court to exhaust those claims that had been found unexhausted.

In April 1993, Mr. Douglas sought a sixty day extension of time to file the state habeas petition; the district court granted an extension of only thirty days. In May 1993, Mr. Douglas sought an additional thirty day extension; the district court granted the request informing Mr. Douglas' counsel that "no further extensions would be granted." *See* June 11, 1993 Order, attached hereto as Appendix C. On June 9, 1993, Mr. Douglas' counsel still required additional time to investigate habeas issues and prepare the state petition, and accordingly, Mr. Douglas requested an additional 60 days in which to file the State petition. The district court denied Mr. Douglas' request, stating that "[i]f petitioner . . . fails to proceed in state court with due diligence, this Court will dismiss the federal case and vacate the stay of execution." *See id.*

Mr. Douglas filed his state Petition for Writ of Habeas Corpus on June 14, 1993 ("State Habeas Petition"). The California Supreme Court requested an informal response on July 16, 1993 and set a greatly accelerated briefing schedule. The Warden filed his brief in opposition to the State Habeas Petition on July 29, 1993, and a letter brief on August 18, 1993. Mr. Douglas responded to the letter brief on August 26, 1993. On October 13, 1993, the State Habeas Petition was denied on the merits.

On January 6, 1994, Mr. Douglas filed a petition for writ of *certiorari* in this Court challenging the constitutionality of California Penal Code sections 190.3. At that time, *Tuilaepa v. California*, 512 U.S. __, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) and *Proctor v. California*, 512 U.S. __, 114 S. Ct. 679, 126 L. Ed. 2d 646 (1994), which had raised substantially identical issues, were pending before this Court. On January 7, 1994, Mr. Douglas sought a stay of the district court proceedings based on the pendency of his petition for writ of *certiorari*. The district court denied Mr. Douglas' request and ordered him to file an amended federal habeas petition no later than January 18, 1994. The court also established a schedule for the filing of the answer and traverse. *See* January 14, 1994 Order, attached hereto as Appendix D.

Mr. Douglas timely filed his Amended Petition for Writ of Habeas Corpus ("Amended Habeas Petition"). The Amended Habeas Petition reasserted the claims that had previously been found unexhausted by the district court. After requesting an extension of time and receiving extra time, Warden Calderon filed an Answer on April 18, 1994. Mr. Douglas filed his Traverse on June 24, 1994. Meanwhile, on June 1, 1994, the lower court denied in its entirety Mr. Douglas' second request for funds to retain an investigator and mental health experts. In or about July 1994, the district court granted in part and denied in part, Mr. Douglas' motion for reconsideration of his request for investigative funds, and at the same time, granted his request for an extension of time to file a request for evidentiary hearing, admonishing Mr. Douglas' counsel regarding the timeliness of the extension request. *See* July 12, 1994 Order, attached hereto as Appendix E. The basis of the request for an extension was, in part, to enable Mr. Douglas to use the investigative funds in order to have any hope of complying with the district court's requirement that the request for an evidentiary hearing

summarize the nature of the evidence to be presented at the hearing. *See* May 10, 1995 Order, Certiorari Petition, Appendix A, at 5, n.1.

The district court established a briefing schedule for the Request for Evidentiary Hearing. *See* July 29, 1994 Order, attached hereto as Appendix F. Mr. Douglas timely filed his Request for Evidentiary Hearing; petitioner filed his opposition on October 31, 1994; Mr. Douglas filed his reply on November 14, 1994. The pleadings on the Request consume 140 pages; the Amended Habeas Petition contains 170 pages, the Answer is 357 pages (including exhibits), and the traverse is another 100 pages. May 10, 1995 Order, Certiorari Petition, Appendix A at 7 n. 3. The trial transcript is approximately 4,000 pages and the entire record consumes thousands of pages more. The guilt phase claims in Mr. Douglas's Request for Evidentiary Hearing involve complex issues of law and fact relating to the adequacy of state hearings resulting in factual determinations, the failure to preserve and disclose exculpatory evidence by the state prosecutor, restriction of cross-examination, the denial of a change of venue motion, the adequacy of the appointment of substitute counsel for Mr. Douglas, representation of Mr. Douglas by ethically conflicted counsel, erroneous instructions to the jury, numerous instances of prosecutorial misconduct, and eighteen instances of ineffective assistance of counsel. The penalty phase claims in the Request for Evidentiary Hearing similarly involve complex legal and factual issues, including nine instances of ineffective assistance of counsel, the exclusion of exculpatory evidence, erroneous instructions to the jury, the erroneous admission of evidence in aggravation, destruction of reporter's notes of a prior relevant proceeding, prosecutorial misconduct, the mental incompetence of Mr. Douglas, the conflict of interest between Mr. Douglas and appellate counsel, and jury misconduct.

REASONS WHY THE PETITION SHOULD BE DENIED

I. MANDAMUS IS NOT A PROPER REMEDY IN THIS CASE.

The All Writs Act, 28 U.S.C. section 1651, does not expand the jurisdiction of this Court. Indeed, the statute itself provides that this Court may issue writs "in aid of [its] jurisdiction[]..." 28 U.S.C. § 1651(a). Supreme Court Rule 20.1 provides:

> The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Mandamus is merely the means "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). This extraordinary remedy therefore exists only where a district court takes some action which it is not empowered to take, or declines to take action which is required of it. A writ of mandate does not reach to those cases in which "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr v. United States*, 351 U.S. 513, 521, 76 S. Ct. 912, 100 L. Ed. 2d 1377 (1956).

Mandamus is a drastic remedy, available only in "exceptional" or "extraordinary circumstances." *Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S. Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984). Petitioner has the burden of showing that his right to issuance of a writ is "clear and indisputable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288-290, 108 S.Ct. 1133, 99 L.Ed. 2d 296 (1988); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662, 98 S. Ct. 2552, 2557, 57 L. Ed. 2d 504 (1978). Where a matter is committed to the discretion of the district court however, as is the time taken to issue a decision, *see Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970), Petitioner's right to a particular result is not "clear and indisputable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 191, 66 L. Ed. 2d 193 (1980). There must be a demonstrable abuse of discretion or conduct amounting to usurpation of judicial power in order for a writ of mandamus to issue. *Mallard v. United States District Court*, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989).

In arguing that this Court should grant a writ of mandamus, Petitioner relies on *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), in which the Ninth Circuit established standards for issuing such a writ. The Ninth Circuit identified five factors to be considered:

(1) Whether the party seeking mandamus has other adequate means, such as direct appeal, to attain the relief desired;

(2) Whether the Petitioner will be damaged or prejudiced in a way not correctable on appeal;

(3) Whether the district court's order is clearly erroneous as a matter of law;

(4) Whether the district court's order manifests an oft-repeated error or a persistent disregard of federal rules; and

(5) Whether the district court's order raises new or important problems or issues of law of first impression.

Bauman, 557 F.2d at 654-55; *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. United States District Court*, 459 U.S. 1191 (1983). These factors are cumulative and should be balanced. *Bauman*, 557 F.2d at 655.

Even if this Court applies the standards established by the Ninth Circuit, in this case, where only the first *Bauman* factor has been satisfied, the request for issuance of a writ was properly denied by the Ninth Circuit and should be denied by this Court as well.[2] With respect to the second factor, Petitioner argues that he is prejudiced by the delay in the State's ability to enforce its laws. Certiorari Petition 14-15. However, where, as here, the district court has not refused to rule, but rather, has expressly stated that it will issue a ruling after an appropriate review of the extraordinarily lengthy record has been completed, May 10, 1995 Order, Certiorari Petition Appendix A at 7, Petitioner will not suffer the "severe prejudice" required for issuance of a writ. *See, e.g., Washington Public Utilities Group v. United States District Court*, 843 F.2d 319, 325 (9th Cir. 1987); *see also In re Cement Antitrust Litigation (MDL No. 296)*, 688 F. 2d 1297, 1303 (1982) (delay in proceedings caused by recusal order would not

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[2] Petitioner has failed to mention that the Petition for Writ of Mandamus in *Lewis v. United States District Court for the District of Arizona*, No. 93-70578, Appendix C to Petitioner's Certiorari Petition, was denied by the Ninth Circuit, and, on petition for writ of certiorari, by this Court, as well. *Lewis v. United States District Court for the District of Arizona*, __ U.S. __, 114 S. Ct. 740, 126 L. Ed. 2d 703 (1994).

constitute sufficient injury). Furthermore, with regard to the third *Bauman* factor, the district court's ruling was not "clearly erroneous," as a matter of law, but rather, was supported by a carefully articulated summary of the proceedings to date, and adherence to the mandate of *Blodgett* that the court give "full and fair consideration to all issues presented in the case." 502 U.S. at 240; *see also Washington Public Utilities Group*, 843 F.2d at 325 (A ruling is clearly erroneous only if the Court is left with the "definite and firm conviction that a mistake has been committed.") (citations omitted).[3]

There is no evidence, or even a contention by the Warden, that the district court's ruling manifests an oft-repeated error or its persistent disregard of federal rules. *See Bauman*, 557 F.2d at 654-55. As set forth in the May 10, 1995 Order, the district court has not condoned delay in this case, May 10, 1995 Order, Certiorari Petition Appendix A at 6, has closely controlled proceedings, and, indeed, has denied Mr. Douglas' requests for extensions on several occasions. May 10, 1995 Order, Certiorari Petition Appendix A at 6. Finally, the district court's refusal to issue an immediate ruling on the Amended Habeas Petition (especially where a request for evidentiary hearing is pending) does not present a legal issue of first impression; the district court's denial of Petitioner's motion was based, as it necessarily must be, on the unique facts, circumstances, legal issues, and procedural posture of this case.

This Court should deny the Certiorari Petition requesting that this Court order the district court to rule on the Amended Habeas Petition within 120 days. Petitioner has not

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[3] In his Motion to Decide Petition, Petitioner relied primarily on *In re Blodgett*, an entirely distinguishable case; the district court's denial of the "legally insubstantial motion," May 10, 1995 Order, Certiorari Petition Appendix A at 7, was therefore proper. Mr. Douglas addresses in further detail, below at Section II, the other inapposite legal authority on which Petitioner has relied both in his Motion to Decide Petition and in this Certiorari Petition.

met his burden of showing a "clear and indisputable" right to the requested relief, *see Allied Chem. Corp.*, 449 U.S. at 36, and has failed to demonstrate entitlement to a writ of mandamus under the *Bauman* factors. *See also Gulfstream Aerospace v. Mayacamas Corp.*, 485, U.S. 271, 289 (1988) ("[t]he 'exceptional circumstances amounting to a judicial usurpation of power' will justify issuance of the writ.")

II. NEITHER IN RE BLODGETT NOR THE OTHER AUTHORITY CITED BY PETITIONER SUPPORTS HIS REQUEST FOR A WRIT OF MANDAMUS FROM THIS COURT.

Relying on *In re Blodgett*, 502 U.S. 236 (1992), Certiorari Petition at 8, 14, and other inapposite cases, Petitioner argues that the district court erred in denying his request for an immediate decision on the Amended Habeas Petition. The facts in *Blodgett* and the resulting delay in that case are, however, wholly distinguishable from Mr. Douglas' case.

In *Blodgett*, the State of Washington sought from this Court, by writ of mandamus, an order directing the Court of Appeals to issue its decision on an appeal from the district court's denial of a second federal habeas petition. Unlike the proceedings in this case, the proceedings in *Blodgett* were seemingly protracted. In *Blodgett*, the petitioner filed his first federal habeas petition, and proceedings thereon were completed when the United States Supreme Court denied certiorari. *In re Blodgett*, 116 L. Ed. 2d at 673. The petitioner then filed a second federal habeas petition in the same district court. *Id.* The second habeas petition was denied; petitioner appealed and was granted a stay of execution. A year later, petitioner filed a

motion to withdraw certain issues from consideration by the Ninth Circuit panel. He then filed his third state action for collateral relief, a personal restraint petition, with the Washington Supreme Court. *Id.* He again moved the Court of Appeals to withdraw certain issues from consideration.

After the denial of his third personal restraint petition, the petitioner filed in the Court of Appeals a request to proceed *pro se* and stated his intention to file a third federal habeas petition. *Id.* The Court of Appeals granted the motion to relieve counsel and directed petitioner to file his third petition. At that point, more than two years had passed since the Ninth Circuit had heard oral argument in the case. *Id.* The Washington Attorney General's office then filed the petition for writ of mandamus to compel the Court of Appeals to decide the petition. Though it recognized that "expedited review of [petitioner's] second habeas petition would have been proper," *Blodgett*, 116 L. Ed. 2d at 674, this Court denied the writ of mandamus.

In this case, Mr. Douglas has filed only one federal habeas petition; unlike *Blodgett*, this case does not involve any successive petitions. Furthermore, the Request for Evidentiary Hearing was filed as soon as practicable given the district court's grant of investigative funds. Finally, the Amended Habeas Petition involves numerous complex factual and legal issues. *See* above at 6. Petitioner is, in effect, asking this Court to issue a writ of mandate to the district court which will cause the district court to abandon "its duty to give full and fair consideration to all of the issues presented in the case." *Blodgett*, 116 L. Ed. 2d at 675. *See also Williams v. Calderon*, 52 F. 3d 1465, 1483 (9th Cir. 1995) (Ninth Circuit rejected habeas petitioner's challenge to the 26-month delay in deciding his federal habeas petition since, "[i]n

light of the magnitude of [the] petition and the mortal interests at stake, the district court's delay in [that] case was neither extreme nor unreasonable.")

The other authority cited by the Warden in support of his Certiorari Petition is similarly inapposite. *Phillips v. Vasquez*, 56 F. 3d 1030 (9th Cir. 1995), cited by Petitioner for the proposition that the Ninth Circuit's policy is not to tolerate "extraordinary delay," Certiorari Petition at 9, is distinguishable from the facts of this case. In *Phillips*, the California Supreme Court had affirmed the habeas petitioner's conviction, but reversed his death sentence. Petitioner was then resentenced to death. The automatic appeal of his sentence was still pending though his conviction had been final for approximately ten years. *Id.* at 6705. The district court dismissed Phillips' habeas petition on the grounds of abstention and exhaustion based on the pending state proceedings regarding petitioner's sentence. *Id.*

The Court of Appeals reinstated the habeas petition, expressly stating that its decision in that case was a narrow one. *Phillips*, 56 F. 3d at 1037. "We simply hold that Phillips should not be required to wait more than fifteen years for his sentence to be finally resolved before he may challenge the constitutionality of his conviction." *Id.* This Court found that Phillips' right to reasonably prompt constitutional scrutiny of his sentence outweighed any existing jurisprudential concerns. *Id.* at 6706. Neither the narrow holding in *Phillips*, nor its result, nor its underlying concerns for the habeas petitioner's right to challenge the constitutionality of his sentence supports granting the Warden's Certiorari Petition and request for a writ of mandate in this case.[4]

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[4] *Steffen v. Tate*, 39 F.3d 622 (6th Cir. 1994), cited by Petitioner, Certiorari Petition at 16, 17, is similarly unpersuasive. In *Steffen*, the Sixth Circuit dissolved the stay of execution where

In this case, the district court's statement that it will issue a ruling when it has completed its review complies with *Blodgett's* mandate to give "full and fair consideration to all of the issues presented in the case." *In re Blodgett*, 116 L. Ed. 2d at 675. The district court's order is not "clearly erroneous." Based on the facts and circumstances of this case, and on *In re Blogett*, this Court cannot have the "definite and firm conviction that a mistake has been committed," *Washington Public Utilities Group v. United States District Court*, 843 F.2d 319, 325 (9th Cir. 1987) or that there are "exceptional circumstances amounting to a judicial usurpation of power." *Gulfstream v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). There is no necessity to compel the district court to discharge authority which it is refusing to exercise. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943).

III. PETITIONER'S UNPRECEDENTED REQUEST THAT THIS COURT EXERCISE ITS SUPERVISORY AUTHORITY TO ESTABLISH A RULE GOVERNING ALL HABEAS CORPUS PETITIONS SHOULD BE REJECTED.

Petitioner requests that this Court exercise it supervisory authority and establish a 120-day limit from the time of the filing of the Answer for all district courts to decide petitions for habeas corpus. Certiorari Petition at 20. This unprecedented and dangerous demand, applicable to cases not before this Court, would subvert the drastic and extraordinary nature of mandamus remedy.

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the district court had granted the stay though no habeas petition had been filed. Accordingly, the Court's discussion of delay focused on the petitioner's failure to file a habeas petition. *Id.* at 627-28. *In re Parker*, 49 F.3d 204 (6th Cir. 1995), similarly involved the erroneous grant of a stay of execution where no habeas petition had yet been filed. In contrast, Mr. Douglas' Amended Habeas Petition was timely filed, as was his Request for an Evidentiary Hearing.

The issuance of the "extraordinary remedy" of the writ of mandamus is justified only when it is clear that "exceptional circumstances amounting to a judicial 'usurpation of power'" exist. *Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967). Unless the record before the court clearly establishes such circumstances, mandamus cannot issue. *See Will v. United States*, 389 U.S. at 105 (issuance of mandamus by Court of Appeals reversed because record did not establish that district court adopted a deliberate policy of violating federal rules or that disclosure of identity of witnesses would involve risk of harm or otherwise prejudice the government's case; "We do not know what [the district court] ordered the Government to reveal under what circumstances in other cases.")

As illustrated by the different facts, legal issues, and procedural postures of *In re Blodgett, Phillips v. Vasquez*, 56 F. 3d 1030 (9th Cir. 1995), and this case, *see* above at section II, federal habeas proceedings in capital cases cannot proceed in any generalized uniform manner or time frame. Petitioner's request that this Court establish a blanket 120 day time limit for ruling on all habeas petitions therefore defies logic and common sense. The proposed rule is particularly inappropriate where, as here, a request for an evidentiary hearing is pending.[5] This Court's use of supervisory authority is better suited to those issues capable of general resolution without regard to specific underlying facts. *See, e.g.*, 9 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 110.28, at 352 (2d Ed. 1995) ("To the extent that discovery practices present questions of law capable of general resolution, supervisory mandamus would seem to be the ideal solution.") (Footnote omitted.) Establishment of arbitrary time limits within which a

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[5] In *Siripongs v. Calderon*, 35 F.3d 1308, 1315 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1175 (1995), the Ninth Circuit held that where a petitioner has made out a colorable claim of ineffective assistance of counsel, it is "generally likely" that an evidentiary hearing will be required. Mr. Douglas's pending Request for Evidentiary hearing involves multiple claims of ineffective assistance of counsel.

district court must rule on the habeas petition in this case or in other pending cases without taking into account the unique facts, legal issues, or procedural postures of each individual case would interfere with the duty of district courts to carefully consider matters before them and would constitute an improper use of this Court's supervisorial power.

CONCLUSION

For these reasons, the Certiorari Petition and request for writ of mandate to the Central District of California should be denied.

Dated: October 9, 1995

Respectfully submitted,

OVERLAND & GITS
MARK OVERLAND

TUTTLE & TAYLOR, A Law Corporation
MARK A. BORENSTEIN
KATE SCHNEIDER GOLD

By _____
Mark A. Borenstein, Attorneys
for Respondent Fred Berre Douglas

92313

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	Case No. CV 91-3055-RSWL ORDER RE: PETITIONER'S MOTION TO EXTEND THE STAY OF EXECUTION AND TO EXTEND THE TIME FOR FILING A PETITION FOR WRIT OF HABEAS CORPUS

This Court is of the opinion that one year is sufficient time to prepare and file a petition for writ of habeas corpus in this case. Accordingly, the petition is due no later than November 16, 1992. The stay of execution is extended until November 20, 1992. No further extensions of time will be granted absent compelling circumstances.

IT IS SO ORDERED.

Dated: September 15, 1992

RONALD S. W. LEW

RONALD S. W. LEW
United States District Judge

APPENDIX B

FILED
FEB 12 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	Case No. CV 91-3055-RSWL ORDER RE: RESPONDENT'S MOTION TO DISMISS THE PETITION

The Court has read respondent's motion to dismiss the petition and all pleadings filed in response to that motion. The Court has also considered the arguments made by both parties at the hearing held on February 8, 1993. In addition, the Court has reviewed those portions of the state record relevant to the issues raised in respondent's motion. Having considered all of the items discussed above, the Court finds that the petition filed on November 16, 1992 contains a number of unexhausted claims.

LAW ON EXHAUSTION

For a federal court to review a state prisoner's claim of constitutional error, the error must have been "fairly presented

to the state courts." Picard v. Connor, 404 U.S. 270, 275 (1977). "A claim is fairly presented if the petitioner has described the operative facts and legal theory on which his claim is based." Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986).

THE UNEXHAUSTED CLAIMS

Before discussing the ramifications of having unexhausted claims, the Court will briefly discuss each unexhausted claim. First, petitioner concedes that guilt phase claims 22(a), 22(b), 22(c), and 23 and penalty phase claims 1(a), 1(c), 1(e), 1(f), 1(g), 3, 4, and 16 are unexhausted and the Court accepts that those issues are unexhausted.

Petitioner's guilt phase claim 7 states that the prosecution withheld evidence of promises and inducements made to key witness, Hernandez. This claim relates to drug charges pending against Hernandez at the time he testified against petitioner. Petitioner argues that this issue is exhausted because petitioner, in a pro per state habeas petition, requested that he be provided with the final court decision relating to the pending narcotics charges against Hernandez. Even construing the pro per petition liberally, petitioner's request did not put the state court on notice of the legal and factual bases of his prosecutorial withholding claim. Therefore, this claim is UNEXHAUSTED.

Petitioner's guilt phase claim 24 alleges nine different instances of ineffective assistance of counsel at the guilt phase. Petitioner argues that this claim is exhausted by virtue of petitioner's pro per petition for rehearing filed April 21,

1990. A review of that petition reveals an inadequate basis for finding that the state court was apprised of the factual and legal bases of the ineffective assistance of counsel claim. Certainly petitioner let the state court know he was dissatisfied with his trial attorney. Nevertheless, the specific factual and legal contentions raised in claim 24 have never been presented to the state court. Accordingly, this issue is **UNEXHAUSTED**.

Petitioner's penalty phase claim 1(b) argues that trial counsel was ineffective for failing to protect petitioner from prejudicial pre-trial publicity. Petitioner submits that the factual basis for the claim has been presented to the state court, but admits that the legal claim presented to the state court focused on the right to a fair trial, not the right to the effective assistance of counsel. For exhaustion, the state court must be given the operative facts and the legal theory. The legal theory behind pretrial publicity affecting the right to a fair trial is different than the legal theory behind attorney error for failing to protect petitioner from pretrial publicity. Therefore, this issue is **UNEXHAUSTED**.

Petitioner's penalty phase claim 10 raises six incidents of prosecutorial misconduct. In particular, claim 10(d) argues that the prosecutor mentioned the time and place of petitioner's arrest, facts not in evidence. Claim 10(e) argues that the prosecutor referred to petitioner's interest in pornography and sexual psychopathy, facts not in evidence. Petitioner contends that even though those specific acts were not presented to the state court, the "substance of the claim" was presented. The focal point of petitioner's argument in his opening brief was the

prosecutor's alleged misstatements of law surrounding the application of the statutory factors. Nowhere in the discussion in the opening brief was there a discussion of factually inappropriate argument. Accordingly, **claims 10(d) and 10(e) are UNEXHAUSTED.**

To summarize, the Court finds that the following claims are unexhausted:

GUILT PHASE - 7, 22(a), 22(b), 22(c), 23, 24;

PENALTY PHASE - 1(a), 1(b), 1(c), 1(e), 1(f), 1(g), 3, 4, 10(d), 10(e), 16.

THE EXHAUSTED CLAIMS

The Court did find that some of the issues deemed by respondent to be unexhausted were, in fact, exhausted. For purposes of completeness, the Court briefly summarizes those findings.

Petitioner's **guilt phase claim 4** states that the grant of immunity to Hernandez deprived him of due process because, under the terms of the immunity, Hernandez had to repeat the same story he told the Mexican authorities or face prosecution. Petitioner's opening brief on appeal, particularly pages 138-146, sufficiently sets forth the factual and legal bases of the federal claim. Accordingly, this claim is **EXHAUSTED.**

Petitioner's **guilt phase claim 6** states that petitioner was deprived of due process and ineffective assistance of counsel during the guilt phase deliberations. The jury asked to rehear the testimony of five witnesses. The court reporter read the testimony of four of the witnesses without petitioner or his counsel being present in the jury deliberation room. Petitioner

never waived his presence. Respondent argues that petitioner never raised the part about his personal waiver being needed. However, in his opening brief (pages 248-251), petitioner clearly argued that he did not, and legally could not, waive his presence at the rereading of testimony. Thus, this issue is **EXHAUSTED.**

Petitioner's guilt phase claim 10 states that petitioner was denied the effective assistance of counsel when the court denied his motion for appointment of counsel to assist him with a Marsden motion/hearing. In particular, claim 10(h) argues that if petitioner had had the assistance of new counsel, new counsel would have discovered that this was trial counsel's first capital case, that he previously worked as a deputy district attorney in Orange County, and that trial counsel was personally acquainted with the prosecutor who handled petitioner's 1977 case. Respondent argues that while the Marsden/denial of counsel issue was presented to the state court, the factual claims regarding what counsel would have discovered have never been presented to the state court. Petitioner argues that this additional factual information did not significantly change the issue from the way it was presented to the state court. Indeed, as petitioner notes, newly discovered evidence does not defeat exhaustion unless it places the case "in a significantly different and stronger evidentiary posture than it was when the state courts considered it." Aiken v. Spalding, 841 F.2d 881, 883 (9th Cir. 1988), quoting, Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983). Thus, this issue is **EXHAUSTED.**[1/]

[1/] Respondent suggests in a footnote that to the extent claim 11 incorporated the arguments of claim 10, claim 11 was similarly unexhausted. Since claim 10 is exhausted, claim 11 is also

Petitioner's **guilt phase claim 12** states that petitioner was denied effective assistance of counsel because his trial counsel had a conflict of interest due to his previous employment as a prosecutor for the Orange County District Attorney. Respondent submits that this factual facet of petitioner's conflict of interest claim was never presented in state court. Petitioner argues that petitioner exhausted this issue in his pro per petition for rehearing filed April 21, 1990. Petitioner's pro per petition does indeed argue that trial counsel had a conflict due to his previous position as a deputy district attorney. This fact, along with the fact that petitioner raised a host of other conflict of interest claims against his trial counsel, mandates a finding that this issue is **EXHAUSTED.**

Petitioner's **penalty phase claim 1(d)** alleges ineffective assistance of counsel for failing to object to prosecutorial misconduct during closing argument to the penalty phase jury. Petitioner correctly notes that this failure to object claim was raised in his opening brief on appeal (pages 394-397). Thus, this sub-issue is **EXHAUSTED.**

Petitioner's **penalty phase claim 13** states that appellate counsel's contentious relationship with petitioner created a conflict of interest that deprived petitioner of the ineffective assistance of counsel. Petitioner is correct that his numerous pro per state habeas petitions raised this claim. As such, this issue is **EXHAUSTED.**

EXHAUSTED.

In summary, the Court finds that the following contested issues are exhausted:

Guilt Phase - 4, 6, 10(h), 11, 12;

Penalty Phase - 1(d), 13.

EFFECT OF HAVING UNEXHAUSTED CLAIMS

The United States Supreme Court has made clear that federal courts cannot hear habeas petitions containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509 (1982). When a district court is faced with a mixed petition, the court must give petitioner the choice of either returning to state court to exhaust the unexhausted claims or refiling the petition with only the exhausted claims. Id.

Petitioner suggests that the special circumstances of his case allow this Court to disregard the unexhausted nature of the claims and proceed to rule on the merits of the petition. Specifically, petitioner argues that the state deprived him of the effective assistance of counsel at the appellate stage by repeatedly ignoring his requests for new counsel. As a result, petitioner's appellate counsel failed to file a state habeas petition, the vehicle through which petitioner would have exhausted his unexhausted claims. Petitioner contends that the state was responsible for his failure to exhaust; therefore, he should not be forced to return to state court now.

While this argument is fairly ingenious, it does not serve to defeat the exhaustion requirement. Petitioner has no constitutional right to counsel for post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 558-559 (1987); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (specifying that there is no

constitutional right to counsel for state post-conviction proceedings even for death row inmates). In this case, petitioner filed a number of pro per state habeas petitions, thus demonstrating that he had access to the state courts for habeas review. Petitioner's failure to raise all of the claims now presented by federal habeas counsel does not require this Court to ignore the exhaustion requirement set forth in Rose v. Lundy.

Because this Court cannot entertain a habeas petition containing both exhausted and unexhausted claims, and because petitioner has elected to return to state court to exhaust his unexhausted claims, this Court orders petitioner to file a state habeas petition containing his unexhausted claims in the California Supreme Court within 60 days from the date of this Order. Petitioner is to lodge with this Court a copy of the state habeas petition. In addition, petitioner is ordered to file a status report every 30 days (counting from the date the state habeas petition is filed) apprising this Court of the status of the state case.

During the next 60 days, and during the pendency of the state litigation, this Court will hold the federal proceedings in abeyance and keep the stay of execution in place. However, if petitioner fails to file a state habeas petition within 60 days, the Court will dismiss the federal case and vacate the stay of execution (unless petitioner files an amended petition containing only exhausted claims within the 60 days).

IT IS SO ORDERED.

DATED: February 2, 1993

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED 2/10/93

Helene G. Frazon
DEPUTY CLERK

APPENDIX C

FILED
JUN 11 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	Case No. CV 91-3055-RSWL ORDER RE: EX PARTE APPLICATION FOR EXTENSION OF TIME TO FILE STATE HABEAS PETITION

The Court has read and considered petitioner's ex parte application for a sixty-day extension of time to file his state habeas, as well as the supporting declaration. That request is DENIED.

Counsel for petitioner were appointed on November 6, 1991, over 19 months ago. The Court allowed petitioner 12 months, until November 16, 1992, to file his petition. On February 12, 1993, the Court found that the petition contained unexhausted claims. The Court held the federal proceedings in abeyance and gave petitioner sixty-days to file a petition in the state court and begin the exhaustion process.

In April 1993, petitioner sought a sixty-day continuance. The Court granted a thirty-day continuance and stated that no further

continuances would be granted.

In May 1993, petitioner sought another 30-day extension. The Court granted that motion. The Court's clerk telephonically informed petitioner's counsel that no further extensions would be granted.

On June 9, 1993, petitioner filed the instant motion seeking yet another sixty-day extension of time to file the state habeas petition. Petitioner continues to assert the same grounds that he has been asserting for the past two requests: he is continuing to investigate and discover new claims.

This Court finds that petitioner has had sufficient time to investigate this case. Moreover, petitioner has been on notice for the past two months that the Court is not inclined to grant further continuances.

Accordingly, the Court orders petitioner to file a state habeas petition with the California Supreme Court no later than June 21, 1993. If petitioner fails to comply with this Order, or fails to proceed in state court with due diligence, this Court will dismiss the federal case and vacate the stay of execution.[1/]

IT IS SO ORDERED.

DATED: June 11, 1993

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED 6/11/93

DEPUTY CLERK

[1/] Alternatively, petitioner may file a petition in this Court containing only exhausted claims, no later than June 21, 1993.

APPENDIX D

ENTERED
CLERK, U.S. DISTRICT COURT
JAN 14 1994
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

1 1 1994

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. DANIEL VASQUEZ, Warden of San Quentin State Prison Respondent.	No. CV 91-3055-RSWL ORDER DENYING PETITIONER'S APPLICATION FOR A STAY OF PROCEEDINGS PENDING A DECISION ON PETITION FOR WRIT OF CERTIORARI **DEATH PENALTY CASE**

The Court has read and considered petitioner's ex parte application for a stay of proceedings pending a decision on petition for writ of certiorari to the United States Supreme Court, as well as respondent's opposition filed prior to the filing of petitioner's application. The Court DENIES the application finding that no legal reason exists for staying the proceedings in federal court.

BACKGROUND

In February 1993, the Court found that the petition previously filed in this case contained unexhausted claims. The Court held the federal proceedings in abeyance while petitioner returned to state court to exhaust his state remedies. In October 1993, the California Supreme Court denied petitioner's state habeas petition on the merits. On

November 18, 1993, following a request from the Court, the parties agreed to a briefing schedule for filing petitioner's amended petition, the answer, and the traverse. According to the schedule, which was signed by the Court on November 19, 1993, petitioner's amended petition was due on January 10, 1994.

On January 7, 1994, petitioner sought a stay of the proceedings in this Court, including a stay of the filing of his amended petition, because he filed a petition for writ of certiorari in the United States Supreme Court on January 6, 1994.

DISCUSSION

The Court finds that the filing of a petition for writ of certiorari does not impact on the proceedings in this Court. The Court held these proceedings in abeyance pending exhaustion. Exhaustion has been completed. Exhaustion requires a claim to be presented to the state courts. See Picard v. Connor, 404 U.S. 270, 278 (1971). Because the United States Supreme Court is not a state court, petitioning for certiorari is not a necessary component of exhaustion and is not required before a prisoner petitions for a writ of habeas corpus in federal court. See Fay v. Noia, 372 U.S. 391, 436 (1963); Ulster County Court v. Allen, 442 U.S. 140, 149 n.7 (1979). Accordingly, petitioner has cured the legal impediment that prevented him from proceeding in this Court.

The Court understands that the United States Supreme Court has granted certiorari on a claim that calls into question the constitutionality of part of California's death penalty statute. Nevertheless, the Court will not stay proceedings in this Court while maintaining a stay of execution pending a ruling by the United States Supreme Court because there exists no legal reason why petitioner cannot

move forward with his federal petition.

CONCLUSION

Petitioner's application to stay proceedings is DENIED. Petitioner must file his amended petition no later than January 18, 1994. The answer will be due on March 18, 1994, and the traverse will be due on April 19, 1994.

IT IS SO ORDERED.

Dated: January 11, 1994

Ronald S. W. Lew
United States District Judge

APPENDIX E

FILED
JUL 12 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. ARTHUR CALDERON, Warden of San Quentin State Prison Respondent.	No. CV 91-3055-RSWL **DEATH PENALTY CASE** ORDER RE: PETITIONER'S EX PARTE APPLICATION TO EXTEND TIME FOR FILING THE MOTION FOR AN EVIDENTIARY HEARING

The Court GRANTS petitioner's motion to extend time for filing the motion for an evidentiary hearing. The Court will notify the parties of the deadline for filing the motion at the time it rules on petitioner's pending second amended application for funds for experts and an investigator.

The Court notes the petitioner has fallen into the habit of filing requests for extensions of time on the day of or one day prior to the date a filing is due. Petitioner is to make every effort to file requests for continuances as early as possible. The Court will no

longer entertain last-minute requests for additional time unless extraordinary circumstances prevented petitioner from making his request in a timely manner.

IT IS SO ORDERED.

Dated: July 12, 1994

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 7/12/94

DEPUTY CLERK

APPENDIX F

FILED

JUL 29 1994

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FRED BERRE DOUGLAS, Petitioner, v. ARTHUR CALDERON, Warden of San Quentin State Prison Respondent.	No. CV 91-3055-RSWL DEATH PENALTY CASE ORDER RE: BRIEFING SCHEDULE FOR PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

Petitioner's Motion for an Evidentiary Hearing is to be filed no later than October 3, 1994. The motion is to include all legal points and authorities that support petitioner's claim(s) for relief, or specific page references to the points and authorities presented in previously filed pleadings.

Opposition to the motion is to be filed no later than October 31, 1994.

Any reply to the opposition must be filed no later than November 14, 1994.

The Court will take the motion under submission and will notify the parties if and when a hearing on the motion will be held.

IT IS SO ORDERED.

Dated: July 29, 1994

RONALD S. W. LEW

Ronald S. W. Lew
United States District Judge